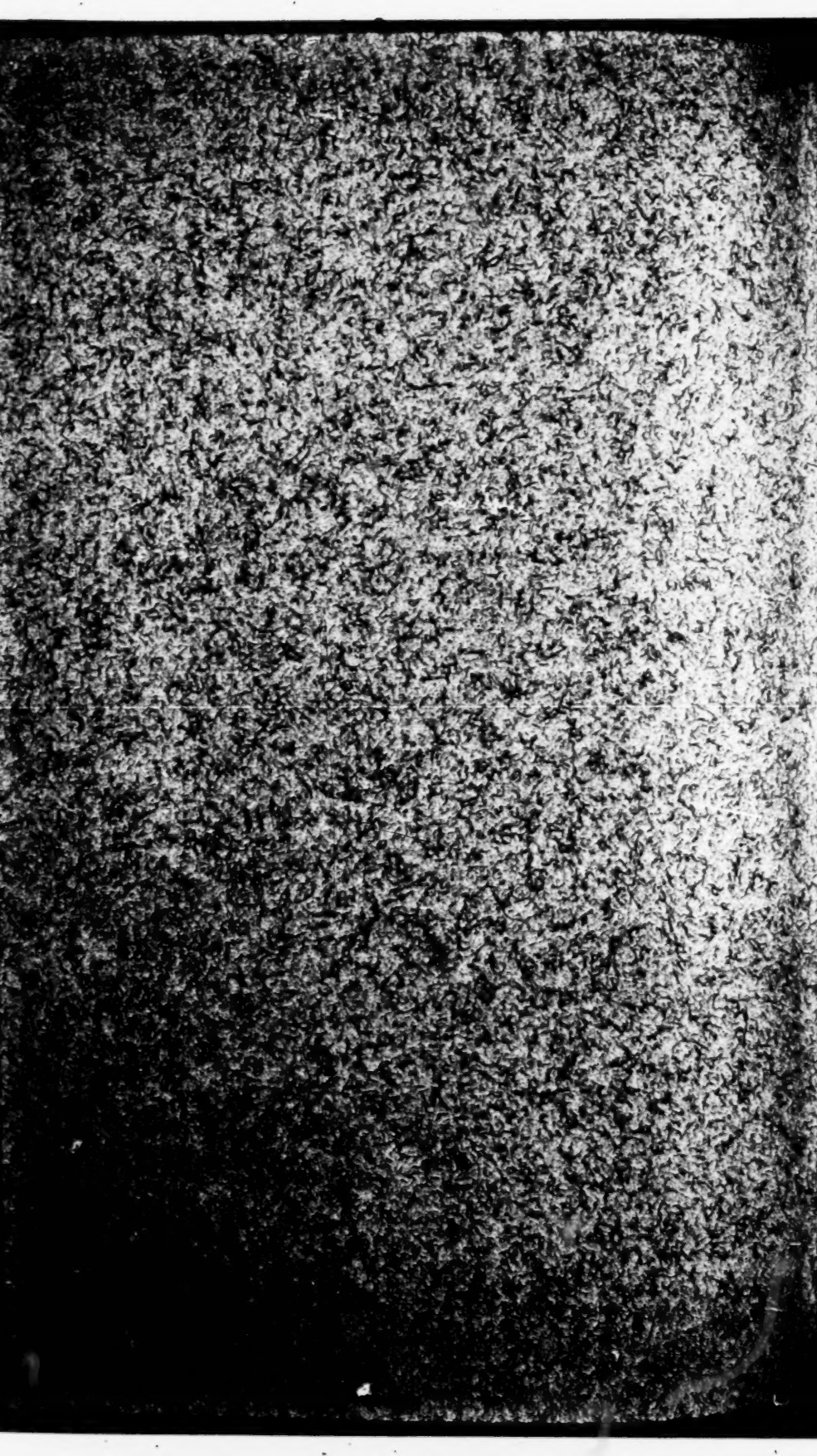

IN THE

Supreme Court of the United States

October Term, 1936. No. 638.

HIRAM STEELMAN, Trustee in Bankruptcy of WILLIAM FOX, a Bankrupt,
Petitioner,

vs.

ALL CONTINENT CORPORATION,
Respondent.

ANSWER IN OPPOSITION TO PETITION FOR A TEMPORARY RESTRAINING ORDER AND FOR A TEMPORARY INJUNCTION PENDING THE DECISION OF THIS COURT UPON A PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Benjamin N. Cardozo, Associate Justice of the Supreme Court of the United States:

The respondent, All Continent Corporation (hereinafter sometimes referred to as All Continent), answering the petition of Hiram Steelman, trustee in bankruptcy of the estate of William Fox, bankrupt, for the issuance of a temporary restraining order and for a temporary injunction pending the final decision of this Court upon the petition for a writ of certiorari, filed January 11, 1937, alleges as follows:

I. At page 2 of the petition for a temporary restraining order, the petitioner Hiram Steelman annexes as part thereof, the petition for a writ of certiorari and marks the same Exhibit A. Brief comment will be made to demonstrate that the facts alleged in the statement in the said Exhibit A are entirely incomplete and fail to present to this Court a proper, complete and clear narrative of the course of events leading up to the making by the United States Circuit Court of Appeals for the Third Circuit of the order reversing the restraint that had been theretofore imposed by the United States District Court for the District of New Jersey.

If there were before this Court only an application for a temporary stay pending consideration of the application for the writ of certiorari, this answer would be confined to a simple statement that the petitioner will suffer no possible hardship pending decision thereon, and that no temporary relief is required.

In fact, however, this Court has been presented with a voluminous petition, and on the basis of the many averments therein has been asked not to maintain the status quo, but actually to reinstate the order of the District Court. This unusual request, and the unusual charges made in support thereof, warrant a more extended answer.

II. There will be submitted to this Court, together with this answer and memorandum, the following: (A) The transcript of record in the Circuit Court of Appeals for the Third Circuit on the appeal from the order of the United States District Court for the District of New Jersey, marked Exhibit 1; (B) The supplemental record on the same appeal, marked Exhibit 2; and (C) The brief of All Continent as appellant on said appeal, marked Exhibit 3.

III. It is earnestly requested that the Court read the various statements contained in the brief in the Circuit

Court of Appeals submitted by All Continent, for a clear and complete statement of the incorporation of All Continent Corporation in October of 1930, at which time the bankrupt, having created it, intended to set up a trust of the stock of All Continent Corporation for his wife, daughters, and grandchildren. This was within a few months after April 1930 when Mr. Fox had concededly received over $18,000,000, in cash, as a result of a sale made by him of certain holdings which he had at that time.

The value of the assets which constituted the capital of All Continent was approximately one-third of the said sum of $18,000,000, leaving Mr. Fox, after the creation of All Continent with a net worth of over $12,000,000 because, in addition to the $18,000,000 which he secured as the result of the sale in April, 1930, he had other substantial assets. Within one month after the transfer of the aforesaid assets to All Continent in December 1930 and in accordance with the express intent at the time of the creation of All Continent, Mr. Fox, on January 28, 1931, set up by deed of trust dated that day, a trust fund for the members of his family, the corpus of which consisted of all the capital stock of All Continent. The charge that All Continent is the alter ego of William Fox is a pure legal formalism which the petitioner adopts to escape the plain inferences from the time and circumstances under which the transfers were indisputably made to All Continent.

At the time of the creation of All Continent, William Fox was wholly solvent and without creditors.

The lapse of five years and a half between that time and the filing of the petition in bankruptcy belies the petitioner's contentions as to the ownership of the assets of All Continent.

IV. The data referred to in the brief (Exhibit 3) submitted by All Continent to the Circuit Court of Appeals for the Third Circuit, demonstrated, as the Circuit Court of Appeals stated, that the commencement by All Continent

of the suit in the Eastern District of Pennsylvania (hereinafter called Pennsylvania suit), was the only proper procedure that could have been followed by All Continent in view of the plainly concerted efforts of the petitioner and certain creditors to jeopardize, if not in fact destroy, the equity in All Continent's brokerage account with J. W. Sparks & Company, at Philadelphia, Pennsylvania.

V. Much comment is made by the petitioner in his petition for a temporary restraining order, as well as in the petition for a writ of certiorari about the vast amount of liabilities and the negligible amount of assets in the bankrupt estate. Petitioner avoids disclosing the fact that there are substantial assets listed in the schedules in bankruptcy other than the sum of $100 in cash and that the bankrupt has *denied liability*, on concededly valid grounds, as to the bulk of the claims listed against him.

VI. Further comment is made by petitioner that All Continent Corporation's president, the wife of the bankrupt, was cited for contempt by the referee. The failure of Mrs. Fox to continue an examination, under Sec. 21A of the Bankruptcy Act, which had been begun, is the subject matter of a separate and distinct proceeding. When the matter was submitted to the District Court upon the certificate of the referee, it clearly appeared that the failure of the bankrupt's wife to continue her testimony was due to no other reason than her physical and mental inability to continue on the witness stand. Ample medical testimony, clear and unbiased, demonstrated the truth of these facts. An independent physician, appointed by the referee, orally concurred in those facts, until subsequently for some reason unknown, the referee's appointee submitted a contrary affidavit.

VII. A further statement is made that the referee upon the 21A bankruptcy proceedings concluded that the All

Continent books should be turned over to the trustee in bankruptcy because of the identity of All Continent and the bankrupt. Not only was that issue not before the referee, but he was without legal power to make any such determination, except in a plenary suit where proper issues were before a trial court. His final act in directing the turn over of the books of All Continent in a summary manner resulted in the District Court, upon review, limiting and modifying substantially the order of the referee. Feeling aggrieved both by the order of the referee and by the modifying order of the District Court, All Continent has appealed from those determinations and that matter is now sub judice in the Circuit Court of Appeals.

VIII. Contrary to the statement made upon the argument at the oral hearing held in Chambers on January 11, 1937, there has not been the slightest interference with the 21A bankruptcy examinations. *They have now continued almost daily for seven months and it is uncertain if and when these hearings will ever terminate.* During the course of these examinations every page of the books of All Continent has thoroughly been examined by counsel for the creditors and counsel for the petitioner, who have been permitted by the referee to roam at will through these books and records. All Continent merely objected to the right of the petitioner or the creditors of William Fox to have physical possession of these books and to their right to mark in evidence pages of these books which admittedly, did not in any wise refer to transactions with the bankrupt. Petitioner herein has sought to convey an erroneous impression on this score.

IX. The brokerage account which All Continent maintained with J. W. Sparks & Co. consisted of various marketable securities traded in upon the New York Stock Exchange. At the time of the service by the Capital Company of the third party subpoena, the stocks

in that account had a market value of approximately $500,000. as against which there was a debit balance of $300,000. due and owing to the broker. This account was, therefore, very narrowly margined and might, at any time, had the market reacted unfavorably, been wiped out entirely. It was only by reason of the steadily rising market since March of 1936 when the subpoena was served by the Capital Company upon J. W. Sparks & Co., that All Continent's equity in this account was saved. The third party subpoena served by the Capital Company, a copy of which is submitted with the papers of the petitioner, is a most drastic, unprecedented and unusual subpoena. The Capital Company sought to tie up the assets of William Fox by alleging that the holder of any assets belonging to thirty or more individuals and corporations should be considered by the holder as an asset of William Fox and therefore subject to the Capital Company's judgment against William Fox. Naturally any recipient of such subpoena is immediately put at great peril in disposing of any asset for fear that ultimately it might be determined that the debtor in some way had some interest in that asset. *The Capital Company claims a priority as to the assets in the J. W. Sparks' account, adverse and superior to the trustee in bankruptcy, and yet we find that the Capital Company and its counsel make every effort and endeavor to avoid an adjudication in the Pennsylvania suit where the rights of the Trustee in bankruptcy, petitioner herein, might be protected.*

As appears in the brief submitted by All Continent in the Circuit Court of Appeals for the Third Circuit, the commencement of the Pennsylvania suit was the sole means wherein and whereby your respondent could obtain a proper determination of the true ownership of the assets which were in the possession of J. W. Sparks & Company and consisted of marketable securities. This action as appears in the moving papers was commenced on September 8, 1936 more than 4 months after the commencement of the

bankruptcy and after the 21A bankruptcy proceedings had been in session for perhaps thirty or forty continuous days. Apparently the petitioner acting in cooperation with the Capital Company, was content to have the brokerage account of your respondent tied up to such an extent that it would be in constant jeopardy. Under this state of facts, All Continent went into the only court that it could possibly go to, to obtain this determination and protect its assets. The holder of the securities was J. W. Sparks & Company, with principal offices located in Philadelphia, Pa. The assets themselves were located there, and had been located there for a very substantial period prior to the filing of the petition in bankruptcy by William Fox. This was not a case where the assets were specifically transferred to a particular locality for the purpose of subsequently instituting an *in rem* proceeding. There was no bad faith or fraudulent intent of any kind in the maintenance of that account. There is not the slightest ground for suggesting that these assets were placed in Philadelphia, Pa., for any improper purpose. That necessarily disposes of the claim made in the moving papers as well as upon the oral argument, that the commencement of an *in rem* proceeding would permit any party to transfer assets world wide and thereupon to institute *in rem* proceedings in innumerable jurisdictions foreign to the bankruptcy court. It later more fully appears that in the very Chancery suit which the petitioner instituted in the Chancery Court of New Jersey, he procured an injunction restraining any transfer of any of the assets of All Continent Corporation, thus avoiding the very threat which the trustee makes so much of. The said injunction, except as subsequently modified to permit transfers in the ordinary course of business, remains today in full force and effect.

X. All Continent Corporation, having commenced the Pennsylvania suit, petitioner immediately petitioned the District Court, where the bankruptcy was pending, for an

injunction restraining that suit, and in that application, in the trustee definitely stated to the Court that he was unable to defend the Pennsylvania suit and would be unable for many months to elicit the necessary facts and information in the 21A bankruptcy proceedings in order to prepare that defense. Here, if ever, was a complete misrepresentation to the District Court. It was in express reliance upon that statement by the petitioner that the District Court granted the injunction against the prosecution of the Pennsylvania suit. The opinion of the District Court leaves no doubt on that score. Within one week following the order of the District Court for the District of New Jersey, the petitioner commenced in the Chancery Court of the State of New Jersey a plenary suit seeking to have that court declare that All Continent was the alter ego of the bankrupt, and for additional relief. Constant reference is made to the fact that the Chancery suit was instituted with the approval of the United States District Court for the District of New Jersey. This is an obvious half-truth, made in the expectation that this Court will infer that a United States District Judge approved the commencement of that suit. This was not so. A petition was presented to the referee in bankruptcy without the slightest reason being given why the suit should be brought in the Chancery Court of New Jersey. The referee signed the order approving the commencement of that suit. The District Judge never even knew that the case had been started in the Chancery Court. It appears from his own opinion that he thought that any suit that would be started of that kind, would be brought in the bankruptcy court. The district judge did not approve the bringing of the suit in the Chancery Court.

It is apparent from the reading of the Chancery petition that the allegations with reference to All Continent constitute the most substantial, if not the only important part of the bill of complaint. The claims

against the other parties defendant are comparatively inconsequential. This Chancery complaint covered over seventy typewritten pages and it was humanly impossible for that complaint to have been conceived and prepared in such a brief time after the District Court had rendered its decision. It is safe to assume that at the very moment that the petitioner was pleading to the District Court that he would be unable for several months to garner the facts pertinent to a plenary suit, he was at the same moment, actually preparing his own bill of complaint. Simultaneously with the service of that bill of complaint, the petitioner obtained an order to show cause, based upon a long detailed affidavit, directing All Continent to show cause why a receiver should not be appointed of all its assets and in that order to show cause and without any notice whatsoever to All Continent, the petitioner obtained from the Vice-Chancellor, a most sweeping and drastic injunction, restraining All Continent from transacting even the most insignificant matter of business. Considering the fact that All Continent is engaged in many branches of business, it would have been suicidal if that injunction continued unmodified. All Continent subsequently prevailed upon the Chancery Court to modify that restraint by permitting the All Continent Corporation to conduct its affairs "in the ordinary course of business". The various papers submitted by the petitioner fail to include the order to show cause containing the restraining order which was granted by the Chancery Court, appearing at pages 124 to 127 of Exhibit 2, submitted herewith. Petitioner has all the protection necessary to avoid any possibility of secreting or concealing assets which is set forth by him as the principal ground upon which he requests this Court to issue a stay. The Chancery Court's injunction, at present in full force and effect, affords the petitioner complete relief.

XI. The application made for a temporary stay seeks the most drastic relief, if any weight is to be given at all

to the oral statements of petitioner's counsel upon the hearing, in Chamber, before Mr. Justice Cardozo on January 11, 1937. They stated that they seek in effect to have this Court forthwith reinstate the injunction against the maintenance of the Pennsylvania suit, which had been granted by the District Court, and which was subsequently reversed by the Circuit Court of Appeals. This they expect this Court to do without any semblance of a hearing, and without any opportunity to present the true facts to this Court.

XII. What fault is there found with the order of the Circuit Court of Appeals? The order merely reverses the restraint that had been issued by the District Court, a copy of said order of reversal is submitted herewith as Exhibit 4. The legal justification for that reversal will be found in the brief of All Continent in the Circuit Court of Appeals and in the opinion of the said Court. The Circuit Court of Appeals heard the appeal from the order of the United States District Court in the bankruptcy proceedings. The United States Circuit Court of Appeals, was, therefore, just as much a bankruptcy court as was the District Court. The supervisory power of the Circuit Court of Appeals was properly exercised in view of all the circumstances in this case.

Petitioner's main grievance, apparently, is that the opinion of the Circuit Court of Appeals contains several dicta which might be prejudicial to his interests. These alleged dicta will be discussed seriatum. If any charge can be lodged to the effect that the opinion of the Circuit Court of Appeals contains various dicta, the reasons are apparent. The Circuit Court of Appeals saw that the issues raised in the Pennsylvania suit and in the Chancery suit boiled down to the simple question whether the assets of All Continent belonged to William Fox. To avoid the continuous jockeying by various parties from one court to another and to untangle what would otherwise be a

hopeless conflict of jurisdiction, the court, in its general supervisory manner, proceeded to set forth a course of conduct to be pursued as a result of which definite and final determinations could be had as to the issues involved.

(A) The Circuit Court stated that the controversy between the petitioner, trustee in bankruptcy for William Fox and the respondent, All Continent in the New Jersey Chancery suit is a separable controversy which petitioner construes to mean "thereby in effect ruling that such suit is removable to the federal court". This did not constitute any ruling whatsoever. The Circuit Court of Appeals cannot participate in determining whether a cause is removable from a State to a Federal Court. The District Court is to determine, upon proper application, whether or not the cause, having been removed to the Federal Court, should be remanded to the State Court. There is no appeal from any determination of the District Court. This question of separability was urged and carefully argued before the Circuit Court of Appeals in order to demonstrate that the issues in the Chancery suit were identical with the issues in the Pennsylvania suit, and to demonstrate the falsity of the claim made to the District Judge that the trustee was unable to defend for lack of data. If there could be any doubt that the Circuit Court of Appeals was right in stating that there was a separable issue in the Chancery suit, that question was definitely adjudicated by a decision and opinion which has just been handed down (January 8, 1937) by the Chancery Court of the State of New Jersey, which carefully and fully considered this entire matter and concluded without the slightest reference to the opinion of the Circuit Court of Appeals, that the issues were separable and, therefore, that the cause should properly be removed from the Chancery Court of the State of New Jersey to the District Court for the District of New Jersey. The opinion and order of removal in the Chancery Court are submitted herewith and marked Exhibits 5 and 6 respectively. That suit, therefore, is now in the

District Court for the District of New Jersey. Petitioner's claim that the stay issued by the Pennsylvania District Court prevents a motion for remand, is, without merit. There is no time limit on a motion to remand.

(B) Complaint is made that the Circuit Court of Appeals' opinion contained another dictum to the effect that the determination of the Pennsylvania suit would be res adjudicata against All Continent as to all the issues arising between the petitioner and the respondent in the New Jersey Chancery suit, "thereby in effect ruling that if petitioner defends the Pennsylvania suit its result will be res adjudicata against him". The analysis which was made by the Circuit Court of Appeals of the separable controversy in the Chancery suit and the analysis made of the pleadings in the Pennsylvania suit made clear the fact that the issues created in both suits were identical, and a determination in one should be a determination for all times. It is of no consequence that in the Pennsylvania suit $500,000 of the assets of All Continent are involved, whereas in the New Jersey Chancery suit some additional assets are involved. Upon the argument in the District Court of New Jersey when the petitioner sought before Judge Avis to restrain the prosecution of the Pennsylvania suit, the trustee argued vigorously that the issues in the Pennsylvania suit were identical to the issues that would arise in the plenary suit which he would ultimately bring. In the opinion of the District Court Judge Avis arrived at the same conclusion. A determination as to a substantial part of the assets of All Continent, even if it be only as to a part, would raise the same issues as a suit concerning the whole. Now especially, since the Chancery suit has been removed to the federal court by the order of the Vice-Chancellor, and all the issues are in the federal court, what can possibly be the intent and purpose of the petitioner seeking to avoid a trial on the merits, in the court where the case was first instituted,

namely, in the Pennsylvania district court? The whole controversy now before this court seems to be academic since both cases are now docketed on the equity side of federal district courts, within the same Circuit.

(C) The third claimed dictum was that the New Jersey Chancery suit was an improper attempt by the petitioner to oust the Pennsylvania court of its jurisdiction, "thereby in effect ruling that respondent may prevent such suit". How this can possibly be a dictum when the Circuit Court of Appeals was convinced of what is too obvious to require argument, that the petitioner had misled the New Jersey District Court into granting an injunction, to avoid a trial in the Pennsylvania District Court. This Court will note as the Circuit Court of Appeals noted that the petitioner's motion to the Bankruptcy Court was to stay the Pennsylvania suit against all defendants. This the Bankruptcy Court refused but merely stayed the action against the trustee, enabling All Continent to proceed, *in any case,* against the others. All Continent had to be stopped at all hazards, and by every device deprived from its day in Court. The petitioner's petition to the Bankruptcy Court and the subsequent Chancery suit were plain devices to escape a trial of the Pennsylvania suit. These facts were evident upon the face of the record in the Circuit Court of Appeals.

(D) The last alleged dictum complained of is that the Circuit Court of Appeals stated "that upon proper application respondent is entitled to enjoin your petitioner from litigating the controversy elsewhere". It is here that the petitioner fails completely to grasp the meaning of the decision of the Circuit Court of Appeals' opinion which merely stated, "upon proper application" respondent is entitled to proceed unmolested in the Pennsylvania suit. What was proper and where the application should have been made was not determined or referred to in the opinion of the Circuit Court of Appeals. It was re-

spondent's belief at the time it sought the restraining order from the Pennsylvania court, that the proper place to make that application was in the Pennsylvania District Court, in an effort to have that court protect its own jurisdiction. If petitioner feels aggrieved by that order, it is his prerogative to appeal from the restraint issued by the Pennsylvania District Court to the proper forum, namely, the Circuit Court of Appeals. Simultaneously with the appearance of counsel before Mr. Justice Cardozo on January 11, 1937, the petitioner filed and perfected an appeal from the order of Judge Welsh entered in the Pennsylvania suit. No justification appears for the attempt by petitioner to jump from the District Court in Pennsylvania to the Supreme Court, as is evidenced by the companion proceedings now pending before this Court for the issuance of a writ of prohibition and/or a writ of mandamus. It is strange, indeed, that on the one hand the same counsel, who are the attorneys for the Capital Company, now appear as counsel for the petitioner, and contend that the petitioner should not be made to appear in the Pennsylvania suit. The Capital Company claims that as to the assets involved in the Pennsylvania suit the Capital Company has a lien prior to that of the petitioner. The Capital Company in its answer filed in the Pennsylvania suit (submitted herewith and marked Exhibit 7) has specifically alleged that the suit is improper and that the suit must be dismissed for the reason that the petitioner (the trustee) is a proper party defendant and that by the order of the District Court for the District of New Jersey, then in force, All Continent was enjoined from proceeding against the petitioner, and, therefore, all the necessary parties were not before the court. In one breath, therefore, counsel for the Capital Company state that the suit cannot proceed because of the absence of the petitioner and in another breath, it urges upon this Court that the petitioner should not come in. Both contentions cannot be true. All Continent as well as the Capital Company and the Circuit Court of

Appeals are all convinced that the petitioner is a necessary party to the Pennsylvania suit. The answer interposed by J. W. Sparks & Company in that suit leaves no doubt that the cloud originally created by the Capital Company over the assets in the Sparks' account was continued and perpetuated by the petitioner. A copy of the answer of J. W. Sparks & Company appears at pages 127 to 139 of Exhibit 2 submitted herewith.

This Court is requested to examine the citation of authorities appearing in the papers submitted in opposition to petitioner's application for a temporary stay and restraining order on the original proceedings lodged with this court for the issuance of a rule to show cause why a writ of prohibition and mandamus should not issue. Those authorities demonstrate the propriety of the Pennsylvania suit and the justification for the action of the Pennsylvania District Court in issuing its restraining order.

XIII. In his petition, the petitioner claims that he is in default in answering the Pennsylvania suit, having relied upon the injunction secured by him in the United States District Court for the District of New Jersey, and that when the Circuit Court of Appeals had reversed the restraint of the District Court, he, the petitioner was then in default. Nothing could be further from the fact. When the Circuit Court of Appeals reversed and vacated the order of restraint of the court below, request was made by the petitioner for an extension of time in which to answer and since December 1, 1936, the date of the reversal by the Circuit Court of Appeals, three or four extensions of time to answer were requested by petitioner and on each occasion, granted. This regrettable error on the part of the petitioner will doubtless be promptly corrected. No attempt was made by respondent to enter any bill pro confesso against the petitioner. It is apparent, therefore, that the All Continent has acted in good faith, while the petitioner was devising various means of avoiding the trial of

the issues on the merits of which these applications are a part. No further sanction should be given to the petitioner's conduct. It is urged that a careful analysis of the facts will show nothing more than a determined effort by those acting with and through the petitioner to block a trial of the Pennsylvania suit. It is that which the Circuit Court of Appeals tried to stop. The petitioner, ~~trustee~~ party in bankruptcy, has adopted a most anomalous position. If as the Circuit Court of Appeals, in its opinion, correctly stated, it was the duty of the trustee to go in and defend the Pennsylvania action and obtain any assets that might be available and at the same time test the claim of priority made by the Capital Company, then, of course, the trustee should have answered and defended that suit. If, on the other hand, the trustee feels it was not his duty, it is inconceivable upon what grounds he should contend that this court should interfere with the prosecution of that suit. His failure to answer and defend may be deemed an admission that he has no standing or any interest which can be affected in that suit.

As was pointed out upon the oral argument in Chambers, the voluminous set of papers in the various proceedings which petitioner has instituted in this Court were delivered to counsel of record for All Continent less than 48 hours before the argument and this despite the fact that the petitions are sworn to on Friday, January 8, 1937, in Atlantic City, New Jersey, at which time and place all counsel were together attending the bankruptcy hearings under Section 21A of the Bankruptcy Act. At that time, the petitioner was present. The failure to deliver copies of the papers to counsel for All Continent, upon its request for such papers, at that time, leaves no doubt that there was a concerted attempt on the part of the petitioner to afford no opportunity to answer the charges made in the papers. Inadequate time afforded to make reply to these charges, has prevented the submission of opposition papers in in-

tegrated, sharp and concise form, for which the indulgence of this Court is prayed.

XIV. There is not the slightest justification for any temporary relief to be granted to the petitioner. The petitioner should be directed to present its application for a writ of certiorari in the normal manner and to afford respondent adequate time to make answer thereto in the usual manner.

If, however, this Honorable Court deems it proper to grant the temporary restraining order and temporary injunction prayed for in the petitioner's moving papers, it is respectfully submitted that the restraining order and injunction should not be granted without security sufficient to indemnify the All Continent Corporation for any losses or damages which may result to it as a consequence of the continued efforts of the petitioner and certain creditors of the bankrupt to tie up the assets of the All Continent Corporation now in the possession of J. W. Sparks & Co., consisting of a stock brokerage account, on margin, against a substantial debit balance. As the value of the said securities is approximately $500,000.00, it is respectfully urged that a bond in that sum be required.

And your respondent will ever pray.

ALL CONTINENT CORPORATION,

By

BENJAMIN REASS,

Attorney for Respondent.

PEPPER, BODINE, STOKES AND SCHOCH,

Of Counsel.

Dated: January 14, 1937.

EXHIBIT 1.

Transcript of Record in the United States Circuit Court of Appeals for the Third Circuit, No. 6253, October Term, 1936.

EXHIBIT 2.

Supplemental Record in the United States Circuit Court of Appeals for the Third Circuit, No. 6253, October Term, 1936.

EXHIBIT 3.

Brief for Appellant, All Continent Corporation, in the United States Circuit Court of Appeals for the Third Circuit, No. 6253, October Term, 1936.

EXHIBIT 4.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 6253. October Term, 1936.

ALL CONTINENT CORP.,

Appellant,

vs.

HIRAM STEELMAN, Trustee in Bankruptcy of WILLIAM FOX,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF NEW JERSEY.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order of the said District Court restraining the All Continent Corporation from proceeding with its suit against the Trustee in Bankruptcy of William Fox in the Pennsylvania Court be, and the same is hereby reversed, with costs.

PER CURIAM,
BUFFINGTON,
Circuit Judge.

Philadelphia,
December 1, 1936.
Endorsements—

Order Reversing Order of District Court
Received & Filed Dec. 1, 1936
William P. Rowland, Clerk

EXHIBIT 5.

IN CHANCERY OF NEW JERSEY.

Between

HIRAM STEELMAN, Trustee for WILLIAM FOX, bankrupt, *Complainant*,

and

ALL CONTINENT CORPORATION, WILLIAM FOX, EVA FOX, BELLE FOX, MONA FOX, WILLIAM FOX TAUSZIG and WILLIAM FOX SCHWARTZ, *Defendants*.

On Petition for Removal.

CONCLUSIONS.

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1. Under *Rule 76* of this court, answers are required to be filed within twenty days "after the service day of the subpoena", but *Rule 2* provides that the time so limited may, "for good cause, be extended by order" of the court.

HELD, that a petition for removal of a cause from this court to the federal court, filed within the time limited by an order duly made by this court, extending the time of the defendants to answer, is within time under *Section 72, U. S. C. A.*

2. In determining the question of diversity of citizenship in removal proceedings, the domicile of the corporation is controlling and not that of its individual stockholders.

3. In a suit brought by a trustee in bankruptcy to set aside transactions alleged to have been in fraud of creditors, the bankrupt is not a necessary party where the re-

lief prayed for is against the grantee or transferee and no relief is prayed for against the bankrupt, other than formal prayers for subpoena and answer.

4. In a determination of the jurisdiction of the federal courts and the right to remove causes of action to them, indispensable parties alone are to be considered and the inclusion of a merely proper party will not oust the jurisdiction of the federal court.

5. An indispensable party is one who has such an interest in the subject matter of the controversy that a final decree cannot be rendered between the other parties to the suit without radically or injuriously affecting his interests, or without leaving the controversy in such a situation that a final determination may be inconsistent with equity and good conscience.

6. Where there is a separable controversy between complainant, a resident of this state, and defendant, a resident of another state, such defendant may remove the entire cause.

Mr. William Elmer Brown, Jr., solicitor for Complainant.

Mr. John Milton, solicitor for All Continent Corporation, (Mr. Murray C. Becker, of the New York Bar, of counsel).

Messrs. Bourgeois & Coulomb, solicitors for William Fox.

Messrs. Cole & Cole, solicitors for Eva Fox, Belle Fox and Mona Fox.

Mr. Ralph O. Willgus, solicitor for Milton C. Weisman, Ancillary Receiver of Fox Theatres Corporation.

Messrs. Proskauer, Rose & Paskus (of the New York Bar), solicitors for Chicago Title & Trust Company.

Sooy, *V. C.*

This matter comes before me on a petition by the defendant, All Continent Corporation, for an order removing the cause to the United States District Court.

Counsel for the complainant opposed the removal and says, first, the petition for removal was not filed within the time limited by statute. The bill of complaint was filed October 13, 1936 and subpoena duly served. Defendant's answers, under Rule 76, "shall be filed within twenty days after the service date of the subpoena", but by Rule 2 it is provided, "the time limited in these rules for doing any act may, for good cause, be extended by order, either before or after the expiration of the time".

Under Rule 76 the answers of the defendants were due on or before November 4, 1936 but on October 28, 1936 the court entered an order as follows:

> "Ordered, that the time of the defendants • • • to answer, plead, demur or otherwise move with respect to the bill of complaint, be and the same is hereby extended to and including the 8th day of December, 1936."

The "good cause" for the order was consent of all parties to the extension of time in order that defendants might have opportunity to investigate the facts and law pertinent thereto, in order to determine upon the future procedure with respect to the bill of complaint.

The requirements of *28 U. S. C. A. Sec. 72,* are that the petition for removal be filed in the "State Court at the time or at any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought, to answer," etc.

The petition for removal was filed on December 3, 1936 and was, therefore, before the time the defendant, All Continent Corporation, was required to answer under the rules of this court. The order extending the time was in conformity with the rules and merely made operative Rule 2 in conjunction with Rule 76. Rule 2 must be read in con-

junction with Rule 76 and, taken together, they constitute the time "before the defendant is required by • • • the rule of the State Court • • • to answer".

It is true that Judge Rellstab, in August of 1916, in *Pilgrim v. Aetna Life Insurance Co.*, 234 Fed. 958, decided otherwise, and it is likewise true that at that time that able jurist said:

> "This question has not been passed upon in this judicial circuit."

But since the time of that decision the Circuit Court of Appeals of the 3rd Circuit, in *Bankers Security Corp. v. Insurance Equities Corp.*, 85 Fed. (2nd Series) 856, have held to the contrary and pointed out that:

> "A number of the inferior courts, mostly before the case of *Ayers v. Watson*, 113 U. S. 594—5 S. Ct. 641, 28 L. Ed. 1093, held that the time for filing a petition for removal from the State to the Federal Court could not be extended by stipulation of the parties, but this position does not seem to be in harmony with the declarations of the Supreme Court. These declarations led to the change of the position in the Southern District of New York."

It is true that the *Ayers Case*, cited by the Circuit Court of Appeals, was decided long before that of *Pilgrim v. Aetna Life Insurance Co., supra*, but it is also true that in the latter case there was no review of the then existing authorities.

But it is argued that "what the court said (*Bankers Security Corp.* case) constitued nothing but dicta" and this is probably true, but that court said:

> "We have thought it best to state what we think the law is and indicate what the practice in this court should be."

This court is not advised of any decision in the courts of this State dealing with this question, but I am furnished with an abundance of authorities in support of the rules that the filing of a petition for removal at any time after the time limited for the filing of the answer by the rule of the court is fatal, even though that time be extended by an order of the court, stipulation of the parties or otherwise, as well as of an abundance of authorities in support of the view laid down by the Circuit Court of this district, supra. A great number of these authorities, pro and con, are cited in *54 C. J., p. 307, sec. 207 (2)*.

It is conceded that the rule in the Southern District of New York and in the State of Pennsylvania is that a petition for removal is in time if filed before the expiration of any extension to plead, given by special order of the court, if the order of the court is authorized by the rules thereof. See (for N. Y.) *Gleason v. H. M. Byllesby & Co.*, 290 N. Y. Supp. 436. (*Sup. Ct., special term, New York County, September 20, 1936*), wherein Justice McLaughlin held, in accordance with the decision of the United States Court for the Southern District of New York, that an application for removal is timely if made before an answer is required to be served, whether the time has been extended by the State court, by a State statute or by stipulation of the parties. As to the rule in Pennsylvania, see citations in *Bankers Security Corp. case, supra*.

Being at liberty, insofar as the Court of Chancery is concerned, to adopt the rigid rule of construction of some jurisdictions, or the rule of less rigidity, which it seems to me is more in accord with modern decisions and more nearly accords with a proper interpretation of *Section 29 of the Judicial Code*, my conclusion is that the petition for removal in the instant case was in time.

The next ground of opposition to the petition is that there is no separable controversy between the complainant, a citizen of New Jersey, and the defendant, All Continent Corporation, a corporation of Delaware.

Section 28 of the Judicial Code (28 U. S. C. A. Sec. 71, in providing for removal of causes from state to federal courts, states:

> "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district."

In order to decide the question involved it is necessary to analyze the bill of complaint, the allegations therein and as contained in the petition for removal being decisive as to the separability of the controversy. *Shapiro v. Christian Bahnsen, Inc.*, 117 N. J. Eq. 165, 175 Atl. 145.

The bill of complaint is composed of four counts as causes of action. The first cause of action is dealt with in 46 numbered paragraphs, from 1 to 46 inclusive, wherein (eliminating paragraphs 11 to 15, both inclusive) complainant charges that William Fox, intending to hinder, delay and defraud creditors, formed the All Continent Corporation and transferred all of his assets to it; that the All Continent Corporation is and was merely the alter ego of Fox and that its assets are his and he, being a bankrupt, his trustee is entitled thereto.

Paragraphs 11 to 15 inclusive, in the first cause of action, seek to set aside as fraudulent a trust agreement made by Fox for the benefit of his wife, children and grandchildren, to the end that the trustee in bankruptcy may regain possession of all the corporate stock of the All Continent Corporation, which stock forms the corpus of the trust created by Fox for the benefit of his wife and others.

The remaining causes of action (2, 3 and 4) seek to set aside as fraudulent transfers of property by Fox to Mrs. Fox, Belle Fox and Mona Fox. The prayers for relief are:

> "1. That All Continent Corporation, William Fox, Eva

Fox, Belle Fox, Mona Fox, William Fox Tauszig and William Fox Schwartz, who are the defendants to this suit may answer this bill of complaint and each statement therein made;

2. That the said defendants may make discovery of what property and assets said All Continent Corporation owns and possesses or to which it is entitled, the character and nature thereof, its probable value, and where the same may be found;

3. That said All Continent Corporation may be decreed to be the alter ego of said William Fox and that said All Continent Corporation and said William Fox are one and the same;

4. That all of the assets of said All Continent Corporation may be decreed to be the assets and property of said William Fox;

5. That said All Continent Corporation may be decreed to hold all of the assets and property claimed to be owned by it and standing in its name, in trust for said William Fox, bankrupt, and/or this complainant, Trustee in bankruptcy for said William Fox, bankrupt;

6. That said assignment and transfer of assets and property made by said William Fox to said All Continent Corporation between the dates of December 23rd and 29th, 1930, in the manner hereinbefore set forth, as well as the assignment and transfer of said brokers' credits at or about the same time, may be set aside and held to be fraudulent and declared to be null and void and of no effect as against the creditors of said William Fox and this complainant;

7. That said indenture of trust dated January 28, 1931, may be set aside and held to be fraudulent and declared null and void and of no effect as against the creditors of said William Fox and this complainant;

8. That the sale of the collateral which said Fox deposited with his said note with said All Continent Corporation which sale took place in the month of December, 1935, and by which said All Continent Corporation became possessed of said collateral and thereby claims to be the owner thereof, may be set aside and held to be

fraudulent and declared to be null and void and of no effect as against the creditors of said William Fox and this complainant;

9. That the assignment and transfer of the property and assets enumerated in said agreements dated February 3, 1936, and May 23rd, 1936, may be set aside and held to be fraudulent and declared to be null and void and of no effect as against the creditors of said William Fox and this complainant;

10. That said All Continent Corporation may be enjoined and restrained from selling, assigning, transferring, mortgaging or otherwise disposing of or encumbering said assets and that said injunction and restraint shall date from the time of the filing of this bill of complaint and to remain in full force and effect until the further order of this Court or until the matters and things in issue herein shall be finally determined;

11. That this Court shall appoint a receiver to take and hold in his possession all of the assets of said All Continent Corporation wherever the same may be found and whatever the same may be, to manage, control and preserve the same under the supervision of this Court from the time of the filing of this bill of complaint, or as soon thereafter as his appointment can be made, until the matters and things herein issue can be finally determined;

12. That said defendants, Eva Fox, Belle Fox and Mona Fox, may make discovery concerning any and all property or thing of value which may have heretofore been assigned or transferred by said William Fox to them or either of them;

13. That all the assets and property herein alleged or claimed to have been assigned and transferred by said William Fox to said defendants, Eva Fox, Belle Fox and Mona Fox, may be decreed to be the assets and property of said William Fox;

14. That said Eva Fox, Belle Fox and Mona Fox, either or all of them, may be decreed to hold all of the assets and property claimed to have been assigned and transferred to them by said William Fox as herein alleged, in trust for said William Fox, bankrupt, and/or

this complainant, Trustee in bankruptcy for said William Fox, bankrupt;

15. That the said assignments and transfers of the assets and property of said William Fox to said defendants, Eva Fox, Belle Fox and Mona Fox as hereinbefore set forth may be set aside and held to be fraudulent and declared to be null and void and of no effect as against the creditors of said William Fox and this complaiannt;

16. That said Eva Fox, Belle Fox and Mona Fox may be enjoined and restrained from selling, assigning, transferring, mortgaging or otherwise disposing of or encumbering any of the assets and property so assigned and transferred by said William Fox to them and each of them as hereinbefore set forth and that said injunction and restraint shall date from the time of the filing of this bill of complaint and to remain in full force and effect until the further order of this Court or until the matters and things in issue herein shall be fully determined;

17. That this Court shall appoint a receiver to take and hold in his possession all of the assets and property now in the possession of or claimed to be owned by said defendants, Eva Fox, Belle Fox and Mona Fox, all or either of them, by reason of the alleged assignment and transfer thereof to them by said William Fox as aforesaid, wherever the same may be found or whatever the same may be, to manage, control and preserve the same under the supervision of this Court from the time of the filing of this bill of complaint or as soon thereafter as his appointment can be made, until the matters and things here in issue can be finally determined;

18. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this court may make in the premises;

19. That this complainant may have such other relief in the premises as this Court may deem just and proper."

An analysis of these prayers discloses, first, that the defendants (naming all) answer; second, discovery. Numbers 3 to 11, both inclusive, but excluding prayer #7, all seek relief with respect to the allegations of the bill of complaint in the first cause of action, and eliminating averments in paragraphs 11 to 15, both inclusive, of the bill of complaint, the question to be determined under the averments of the bill is, did Fox incorporate the All Continent Corporation, constitute that corporation his alter ego, transfer to it his assets, intending thereby to defraud his creditors, and if it is ascertained that he did so do, the appropriate relief will be to recapture these assets for the trustee under prayers 3 to 11, both inclusive, but excluding #7.

If it also be found on final hearing that the trust agreement was fraudulent, as alleged in paragraphs 11 to 15 of the bill of complaint, then that instrument will be set aside under the 7th prayer for relief.

The relief sought by prayers 12 to 17, both inclusive, relate to counts 2 to 4 inclusive, and defendants therein are Mrs. Fox, her daughters and grandchildren, and have absolutely nothing to do with the All Continent Corporation.

It will be observed that, outside of the trust agreement, there is no allegation that Belle Fox or any other defendant, outside of Mr. Fox and the All Continent Corporation, has ever had or now has custody of any of the assets of the All Continent Corporation, or that they or any of them participated in any of the alleged frauds with reference thereto, insofar as the transfer of assets from Fox to the All Continent Corporation is concerned, or insofar as the subsequent disposition of the transferred assets are concerned.

The relief sought against the wife, daughters and grandchildren is recovery of the capital stock of the All Continent Corporation and other assets formerly belonging to Mr. Fox, other than those assets he allegedly, in fraud of creditors, turned over to the All Continent Corporation.

It would seem, therefore, that the bill of complaint is of a two-fold nature (a) recovery from the All Continent Corporation for the benefit of creditors, through complainant as trustee, the assets which Fox transferred to the All Continent Corporation, and (b) recovery of other assets which Fox transferred to the other defendants than the All Continent Corporation.

As to (a), in addition to the fact that there is no allegation that any of the assets of the All Continent Corporation were ever transferred to any other defendant than that corporation, the allegations generally are that Fox, being possessed of stocks, bonds and securities of a value of over $6,000,000., "transferred and conveyed *all* of his said securities of the value aforesaid to All Continent Corporation". The bill then alleges that all of these securities continued to be under the sole control and dominion of Fox, to the exclusion of the All Continent Corporation, but that by virtue of a series of events starting with December 1935 (sale of collateral securing a note) and in February of 1936 and on May 23, 1936 (exhibits B and C) the All Continent Corporation re-captured or took over all of the assets of Fox, so that "said William Fox was divested of all property of every kind and description which was of any importance or value and he was thereby denuded of all the vast wealth" formerly his. It is this "vast wealth" held by the All Continent Corporation which the trustee seeks to recover from the All Continent Corporation.

It is also true that it is alleged that Fox alone was the originator of the entire fraudulent scheme and, while it is said that the other (Fox) defendants had knowledge thereof, no relief is asked of them, excepting as to assets received by them from Fox other than those held by the All Continent Corporation.

The allegation of paragraph 42 is that all of Fox's transactions with the All Continent Corporation "were each and every one of them a part of a general scheme or plan devised and put into effect by said William Fox", in fraud of creditors.

It is quite apparent from the above that the Fox defendants, other than possibly William Fox, are not all necessary parties to the cause of action (a), and that unless William Fox is a necessary party defendant as to this cause of action, the order for removal should be granted.

It is argued that the theory of the bill of complaint is that "the organization of the All Continent Corporation and all of the transactions had with respect to it was part of a scheme or plan to defraud creditors and that all parties are necessary parties".

Of course, the theory of counsel may not control but any party whose rights would be affected by the decree prayed for is a necessary party.

A decree ordering the All Continent Corporation to turn over to the trustee all its assets would not affect the rights of any defendants other than the All Continent Corporation. If these assets were transferred in fraud, as alleged, they never belonged to any one other than Fox and they now belong to his trustee in bankruptcy. Mrs. Fox and the daughters and grandchildren never had any title or interest in these assets and no decree could be made against them with respect thereto.

If the rights of the defendants, other than the All Continent Corporation, are to be affected by a decree it must be one that holds that there was fraud in the transfer of the stock of the All Continent Corporation to Mrs. Fox under the trust agreement and that that agreement, being void, the stock must be re-transferred by Mrs. Fox to the trustee of William Fox. This is a separate transaction, entirely distinct from the transfer from Fox to the All Continent Corporation of his other assets.

The All Continent Corporation was incorporated in October of 1930, the trust agreement was dated January 28, 1931, the transfer of assets from Fox to the All Connent Corporation was made between December 23rd and 29th, 1930. Of course, if fraud is found at the final hearing, so that the court decrees a return of all assets of the

All Continent Corporation, the stock held by Mrs. Fox as trustee will be worthless. But the mere fact that as a stockholder of the All Continent Corporation she will be affected and that she, as such a stockholder, is a resident of New Jersey, does not either make her, as such stockholder, a necessary party, nor does her residence in New Jersey prevent the transfer to the Federal Court. The residence which must be ascertained is the corporate residence and not that of individual stockholders.

The latest decision on this point seems to be *Puerto Rico v. Russell & Co.*, 288 U. S. 476, wherein the court said:

> "For almost a century, in ascertaining whether there is the requisite diversity of citizenship to confer jurisdiction on the federal courts, we have looked to the domicile of a corporation, not that of its individual stockholders, as controlling. *Louisville, C. & C. R. Co. v. Letson*, 2 How. 497; *Rundle v. Delaware & Raritan Canal Co.*, 14 How. 80; *Marshall v. Baltimore & Ohio R. Co.*, 16 How. 314; *Lafayette Insurance Co. v. French*, 18 How. 404; *Covington Drawbridge Co. v. Shepherd*, 20 How. 227; *St. Louis & San Francisco Ry. Co. v. James*, 161 U. S. 545; *Patch v. Wabash R. Co.*, 207 U. S. 227. In its final form this rule of jurisdiction was stated in terms of a 'conclusive presumption' that the stockholders are citizens of the state of the corporate domicile, see *Marshall v. Baltimore & Ohio R. Co.*, supra, 328; *Covington Drawbridge Co. v. Shepherd*, supra, 233; *St. Louis & San Francisco Ry. Co. v. James*, supra, 554, but even those who formulated the rule found its theoretical justification only in the complete legal personalty with which corporations are endowed. Fictitious that personality may be, in the sense that the fact that the corporation is composed of a plurality of individuals themselves legal persons, is disregarded, but 'it is a fiction created by law with intent that it should be acted on as if true'. *Klein v. Board of Supervisors*, 282 U. S. 19, 24. This treatment of the aggregate for other purposes as a person distinct from its members, with capacity to perform all legal acts, made it possible and convenient to treat it so

for purposes of federal jurisdiction as well." (Pages 479, 480.)

But it is said that in *Shapiro v. Christian Bahnsen, Inc., supra,* the court, dealing with "facts identical with the facts herein" held otherwise. The fundamental difference in fact between the two cases is that in the instant case, insofar as the assets of the All Continent Corporation are concerned, complainant seeks the return thereof to him as trustee of Fox from no other defendant than the All Continent Corporation, while in the Bahnsen case that complainant sought "a decree against each for such part only of the funds and securities as each may be found to hold now, or a money decree • • • for such part as they may have disposed of. The complainant seeks to hold all defendants liable for the total amount • • • not necessarily any one of them for the whole, but each for a part thereof", etc., and again the court was dealing with a situation where the individual defendants "transferred such property to *themselves* to hold under a corporate guise" while in the instant case the charge is that the corporation was the alter ego of Fox and no other person.

Is Fox a necessary party, i. e., an indispensable party, by which is meant one who has such an interest in the subject matter of the controversy that a final decree cannot be rendered between the other parties to the suit without radically or injuriously affecting his interest, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience? *Sioux City Terminal R. & W. Co. of N. A.*, 22 C. C. A. 73, 75; 82 Fed. 124, 126. See also *Rogers v. Penebscot Mining Co.* (C. C. A.), 154 Fed. 606.

The only prayer for relief against Fox is that he answer and (2) "that the said defendants may make discovery of what property and assets said All Continent Corporation owns and possesses or to which it is entitled, the character and nature thereof, its probable value, and where the same may be found".

In view of the allegations of the bill to the effect that Fox divested and denuded himself of all of his vast wealth and that the All Continent Corporation is the possessor thereof (excepting the trust assets), the language of the prayer appropriately requires that the All Continent Corporation make discovery of all its property so received and so held, but the prayer for relief with respect to this property is not against Fox but against that corporation. The prayer for discovery is not in aid of establishing the alleged fraud but in aid of an ascertainment from the All Continent Corporation as to its assets received from Fox, and their value. It would seem that the ultimate result of the litigation, if complainant is successful, must be a decree against the All Continent Corporation, requiring the transfer of all its assets to the trustee, and a decree against Mrs. Fox, as trustee, requiring her to transfer to the trustee all the stock of the All Continent Corporation held by her as trustee, but while these dicrees would be predicated upon a finding that Fox created the All Continent Corporation in fraud of creditors and transferred his assets to it for that purpose, and also created the trust in the same manner, yet Fox has no interest in the litigation to be affected by these decrees. The trustee in bankruptcy represents his rights. All the transfers by Fox, either to the corporation or his wife, are good as between Fox and them, and if the trustee gets more than enough assets to pay the creditors, the All Continent Corporation would get the excess on its assets, and the trust would likewise get any excess on the value of its stock.

This seems to be borne out by the case of *Small v. Gilbert*, 56 Fed. 2nd. 616, wherein the court said:

> "In a suit brought by a trustee in bankruptcy to set aside a conveyance alleged to be in fraud of creditors, the bankrupt is not a necessary party; it is assumed that he had no interest to be affected, except that which was represented by his assignee in bankruptcy, who brings the suit. *Huntington v. Saunders*, 120 U. S. 73;

30 L. Ed. 580; *Buffington v. Harvey*, 95 U. S. 99, 24 L. Ed. 381."

In the *Buffington* case, on appeal, the court said:

"The appellant also insists that the original bill was defective for want of parties in not making the bankrupt a party. • • • The bankrupt had no interest to be affected, except what was represented by his assignee in bankruptcy, who brought the suit. As to the bankrupt himself, the conveyance is good; if set aside, it could only benefit his creditors. He could not gain or lose, whichever way it might be decided."

To like effect is *Cox v. Wall*, 99 Fed. 546, affirmed 101 Fed. 403, and reversed on other grounds in *181 U. S. 244*, and *Harding v. Crosby*, C. C. S. D. N. Y., 17 Batchf. 348, Fed. Cas. No. 6050.

In *Benton, Assignee, etc., v. Allen, et al.*, 2 Fed. 448, the court held that the bankrupt was not a necessary party in a suit to declare a deed null and void as a fraudulent transfer, and that

"He might have been used as a witness without making him a party."

And further,

"A decree of nullity against the two Wilders would, by operation of law, vest the estate in these lands in the assignee without any decree of nullity of the deed as against the bankrupt."

The defendants cite as contrary authority *American Surety Company of New York v. Conway*, 222 Fed. 140, wherein the court held that the administrator of a deceased grantor in a conveyance alleged to be fraudulent was a necessary party defendant. In that case the prayer was that one of the defendants be decreed to hold the land in trust for the benefit of the judgment creditor, subject to the lien of its judgment, and that the heirs of the deceased

grantor pay the judgment and account for the rents and profits, and the administrator of the deceased was, of course, a necessary party, particularly in view of the fact that the bill alleged that decedent, during his lifetime, and his heirs thereafter, received to his and their use the rents, etc., as fully, to all intents and purposes, as if the pretended conveyance had not been made, and prayed an accounting. In the instant case, as heretofore noted, no affirmative relief is prayed for against Fox.

Defendants further rely on *In re Vadner*, 259 Fed. 614, and *Casey v. Baker*, 212 Fed. 247, the former being a Nevada case and the latter from the northern district of New York, in each of which cases a trustee intervened after the institution of the suit against the grantor who, after the institution thereof, was adjudicated a bankrupt.

There being a separate and distinct controversy between complainant and defendant, All Continent Corporation, the entire cause must be removed, in pursuance of the prayer of the petition of that cause. *Barney v. Latham*, 103 U. S. 205; *Gainesville v. Brown Investment Co.*, 277 U. S. 54; *Des Moines Elevator v. Underwriters* (C. C. A. 8), 63 Fed. (2d) 103; *Hoffman v. Lynch* (D. C. N. D. Ga.), 23 Fed. (2d) 518.

Determined: January 8, 1937.

EXHIBIT 6.

IN CHANCERY OF NEW JERSEY.

Between:

HIRAM STEELMAN, Trustee for William Fox, a Bankrupt,
Complainant,

and

ALL CONTINENT CORPORATION, WILLIAM FOX, EVA FOX, BELLE FOX, MONA FOX, WILLIAM FOX TAUSZIG, and WILLIAM FOX SCHWARTZ,
Defendants.

On Bill, etc.

On Petition for Removal, &c.

ORDER OF REMOVAL

This matter being opened to the court by JOHN MILTON, Solicitor for the defendant, All Continent Corporation, and it appearing that the said defendant has duly filed its petition for the removal of this cause to the District Court of the United States for the District of New Jersey in due form of law, and that said defendant has also filed its bond in the penal sum of $500.00 with United States Fidelity & Guaranty Company, as surety duly conditioned, in accordance with the statute in such case made and provided, and that said defendant has given the complainant due and legal notice of this application, and it appearing to the court that this is a proper cause for removal to said District Court;

It is on this 8th day of January, 1937,

ORDERED, that the petition and bond of the defendant All Continent Corporation are hereby approved and accepted and that the above entitled cause be removed to the

District Court of the United States for the District of New Jersey, pursuant to the statute of the United States in such case made and provided, and that all other proceedings in this court be stayed.

LUTHER A. CAMPBELL.

C.

Respectfully advised,

W. F. SOOY,
V. C.

EXHIBIT 7.

Answer of Capital Company in the United States District Court for the Eastern District of Pennsylvania, No. 9533, June Term, 1936.